AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 670.

EDWARD H. LITCHFIELD, EXECUTOR OF EDWIN C. LITCHFIELD, DECEASED, PLAINTIFF IN ERROR,

vs.

GEORGE CRANE, ADMINISTRATOR OF EDWARD K. GOODNOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

RECORD FILED SEPTEMBER 29, 1886.—AGREED RECORD FILED OCTOBER 5, 1887.

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1 *Appeal from the Judgment of Webster District Court.*

In the Supreme Court of Iowa. December Term, 1884.

EDWARD K. GOODNOW, Appellee,

vs.

EDWIN C. LITCHFIELD, Appellant.

C. H. Gatch, for appellant; George Crane, for appellee.

Appellant's Abstract of Record.

July 26, A. D. 1880, the plaintiff filed his petition in equity in the circuit court of Webster county, Iowa, stating his cause of action as follows:

Paragraph 1. That on or about the 15th day of May, 1856, the Congress of the United States, by an act approved on that date, granted and conveyed to the State of Iowa, in trust to aid in the construction of a railroad from the city of Dubuque, on the Mississippi river, across said State to a point on the Missouri river, near Sioux City, every alternate section of land designated by odd numbers for six sections in width on each side of said road; and in case there was not enough land within said limits subject to said grant to make the full six sections of land for each mile of road to be constructed, then that said State should be entitled, within fifteen miles on either side of said railroad, to so much land in alternate sections or parts of sections as should be equal to the amount of land
2 in odd-numbered sections within the said six-mile limits as were not subject to the operation of said grant, and that to make a full grant of six sections per mile said State became entitled to and received a proper certificate for all the odd-numbered sections and parts of sections within the said fifteen-mile limits that had not been sold or otherwise appropriated by the United States and to which the rights of pre-emption had not attached.

Par. 2. Plaintiff further says that on or about the 14th day of July, 1856, the said State of Iowa having duly accepted said grant and undertaken the trust therein declared by an act approved on that date, granted all of said lands to the Dubuque & Pacific Railroad Company, a corporation duly organized under the laws of said State, on condition that said company would build the railroad contemplated in said act of Congress.

That afterwards, in August, 1860, the said Dubuque & Pacific Railroad Company sold, transferred, and conveyed its said railroad and all its property of every kind and nature, including all its right, title, and interest in and to its lands given or granted to it by said State of Iowa to aid in the construction of said railroad to the Dubuque & Sioux City Railroad Company, a corporation duly organized under the laws of Iowa, which said last conveyance was afterwards recognized, approved, and assented to by the State of Iowa, a copy of which, marked Exhibit "A," is attached to this petition.

Par. 3. Plaintiff further says that said railroad companies duly constructed said railroad according to the terms and requirements of said act of Congress, and prior to the year 1861 earned all the lands designated or conveyed by the language of the granting clause of said act of Congress, and lying or being situated on the east side of the Des Moines river, in Webster county, Iowa.

Par. 4. Plaintiff further says that from 1860 to 1873 the said Dubuque & Sioux City Railroad Company, under and by virtue of said grant of land and the construction of said railroad, honestly and in good faith believed it was the absolute owner of and held a good and valid title during all the years of 1861 and 1862, and till the 12th day of November, 1863, to the following-described lands, to wit:

All of section 7, the N. W. qr., the S. E. qr., and the E. h'f of S. W. qr. of section 11, township 87, range 28; lots 2, 3, and 4, the N. W. qr. of the N. W. qr. and the S. h'f of the N. W. qr. and S. h'f of section 27, township 88, range 28; the N. E. qr. of the N. E. qr. and the W. h'f of the S. E. qr., the W. h'f of the S. W. qr. of section 1; all of sections 11, 13, 17, and the S. h'f of section 23, in township 88, range 29; the E. h'f of section 33, the W. h'f of the N. W. qr. the E. h'f of S. W. qr., and the W. h'f of the S. E. qr. of section 35, in township 89, range 27; the N. W. qr., the undivided h'f of the N. E. qr. of the N. E. qr., and of lots 1, 2, 3, 4, 5, and 6 of section 7, and the N. h'f and the S. E. qr. of section 9, and the undivided h'f of the N. E. qr., the undivided h'f of the E. h'f of the S. E. qr., and of the N. W. qr. of the S. E. qr. and of the N. E. qr. of the S. W. qr.
3 of section 17, and the E. h'f and S. W. qr. of section 21, the S. E. qr. of the N. W. qr. and the S. h'f of the S. W. qr. and the S. W. qr. of the N. E. qr. of section 23, the E. h'f and the S. W. qr. of section 25, the N. E. qr. of section 27, the E. h'f of the S. W. qr., and the W. h'f of the S. E. qr. of section 35, all in township 89, range 28; all of section 17, the N. W. qr. and the S. E. qr. of section 19, lots 1, 2, 3, and 4, and the E. h'f of section 31, all in township 90, range 28, Webster county, Iowa. All of which lands are designated by odd numbers, and are within the six and fifteen mile limits of said railroad, and without which said railroad grant did not amount to six sections per mile of railroad built.

But in the year of 1873, the Supreme Court of the United States in a suit therein pending, for the purpose of testing the right and title of the Iowa Homestead Company, a grantee of the said Dubuque & Sioux City Railroad Company to the land aforesaid, decided finally that neither said railroad company nor said homestead company was the owner thereof and never had any right or title thereto, since which time neither of said companies has claimed to be the owner of said land or any part thereof.

Par. 5. That during the continuance of said belief and claim of ownership the said Dubuque & Sioux City Railroad Company paid to Webster county, a municipal corporation under the laws of Iowa, and within whose territorial limits said lands are situated, the taxes which were duly assessed and levied upon said lands by said county, that is to say, the amounts and at the dates following and for the following years respectively:

For 1861, paid October 31, 1866, $2,635.
For 1862, paid December 9, 1863, $1,310.25.
For 1863, paid January 20, 1864, $1,269.43.

Par. 6. Plaintiff further say that the taxes so assessed and levied upon said lands became, and were a valid and binding lien thereon in favor of said county, which said lien was superior or paramount to all other liens or incumbrances thereon.

Par. 7. Plaintiff further says that long prior to the assessment and levy of said taxes upon said lands the said defendant herein became and was the real owner thereof and ever since has been such owner, but, of defendant's said ownership said Dubuque & Sioux City Railroad Company had no knowledge or notice at the time of constructing said railroad nor till long after the payment of the taxes aforesaid.

Par. 8. Plaintiff further says that said defendant has never paid to said county the taxes aforesaid or any part thereof and that said county has always hitherto refused and still refuses to refund to said last named railroad company or its assignors the taxes so paid to said county by said railroad company as hereinbefore alleged.

Par. 9. Plaintiff further says that said defendant is now and always has been a non-resident of the state of Iowa.

Par. 10. Plaintiff further says that the said Dubuque &
4 Sioux City Railroad Company has assigned, transferred and set over to the said plaintiff all its right, title, and claim for all of said taxes and the right to recover or obtain the same from the said defendant, a copy of which assignment, marked Exhibit "B," is hereto attached and made part of this petition.

Par. 11. Wherefore plaintiff asks judgment against the defendant for the sum of six thousand dollars, interest and costs of suit, that the same be made a special lien on the lands above described, and for such other and further relief in the premises as equity and good conscience may require and to this court may seem meet.

EXHIBIT "B."

This agreement witnesseth: That in consideration of the covenants and agreements hereinafter mentioned, and to be kept, observed, and performed by Edward K. Goodnow, of the city and State of New York, the Dubuque & Sioux City Railroad Company, a corporation organized and existing under the laws of the State of Iowa, has assigned, transferred, conveyed, and set over, and by these presents does assign, transfer, convey, and set over, unto the said E. K. Goodnow all the right, title, claim, or demand, or cause of action either in law or equity which said railroad company may have against any person, company or corporation on account of or by reason of its payment to Webster county, in the State of Iowa, of any taxes assessed or levied by said county upon lands situated within the territorial limits thereof, and in which said railroad company heretofore had or claimed to have an interest or title, and especially all claims, demands and rights of action in law or equity which said railroad company may have or hold against any person, company

or corporation, by virtue of said railroad company having paid or handed over for 1861, 1862, and 1863 to said Webster county the taxes assessed or levied by said county upon the lands or any part thereof, formerly claimed by said railroad company as part of the lands granted by Congress to aid in the construction of its railroad, and located within five miles of the Des Moines river, in said county, but which were finally adjudged by the courts to be no part of said land grant, and does hereby authorize the said E. K. Goodnow to enforce said claim, demands or right of action by suits in his own name. In consideration whereof the said E. K. Goodnow hereby agrees to use or exercise reasonable care or dilligence to enforce said claims, demands, or rights of action, and after deducting all costs and expenses incurred in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning the same. Signed by the respective parties hereto.

E. K. GOODNOW.
THE DUBUQUE & SIOUX CITY R. R. CO.,
By M. K. JESUP, *President.*

5 On the 19th day of April, 1881, defendant filed his answer to the petition, setting up the following defenses:

1. He admits the passage by the Congress of the United States of an act, approved May 15, 1856, which purported to grant to the State of Iowa lands as and for the purpose in the first paragraph of said petition set forth; admits the passage of an act of the Legislature of the State of Iowa, approved July 14, 1856, purporting to grant
6 to the Dubuque & Pacific Railroad Company all of said lands in the first paragraph of the petition described, as and for the purpose and upon the condition in the second paragraph of the petition set forth; admits that in August, 1860, said Dubuque & Pacific Railroad Company executed to the Dubuque & Sioux City Railroad Company a conveyance, a copy of which is attached to the petition as Exhibit "A;" admits that in the year 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of the Iowa Homestead Company, a grantee of said Dubuque & Sioux City Railway Company to said lands, decided that neither said homestead company nor its grantor was, or at any time had been, the owner thereof or any part of the same; admits that this defendant has not paid said Webster county said alleged taxes in the petition mentioned or any part thereof; admits that he is and always has been a non-resident of the State of Iowa.

2. He denies each and every allegation in said petition contained and every part thereof not heretofore expressly admitted; and, further answering, says:

3. That during the years from 1860 to 1865, both inclusive, adverse claims of title were made to said lands, the taxes on which are in controversy herein, by the Des Moines Navigation & Railroad Company and its grantees, claiming the same under the act of Congress of August 8, 1846, known as "The Des Moines River Land Grant," and the Dubuque & Pacific Railraad Company and its

grantees claiming the same under the act of Congress of May 15, 1856, known as the "Railroad Grant," and that by reason of such adverse claims of title thereto the title was withheld by the General Government for the purpose of adjusting or determining with respect to said conflicting claims, and the certification thereof under said last-mentioned act was suspended until April, 1863, that the claim of title to said lands by plaintiff's assignor, and its grantors, therefore, did not have its inception until the last-mentioned date, and said lands could not have become subject to taxation under said last-mentioned act and their certification thereunder, had they been held to pass under the gaant thereby made. Wherefore defendant says the payment of the taxes thereon for said years was both voluntary and officious.

4. That if any cause of action ever accrued to plaintiff's assignor, the said Dubuque & Pacific Railroad Company, against this defendant for the recovery of any of said taxes or any sum of money on account thereof, for any of said years, the same did not accrue at any time within five years next preceding the commencement of this action, and is, therefore, barred by the statute of limitations of the State of Iowa.

5. That ever since the year 1860 this defendant has been a citizen and resident of the State of New York, and if any cause of action ever accrued to plaintiff or his assignor against defendant, for the recovery of any of said alleged taxes or any sum of money on
7 account thereof, for any of said years, the same did not accrue at any time within six years next preceding the commencement of this action, and is, therefore, barred by the statute of limitations of the State of New York.

6. That the title to all of said lands was fully and absolutely in the United States until the 2d day of March, 1861, and, therefore, could not have been and was not subject to taxation prior to that time.

7. That said lands did not become subject to taxation under either of said conflicting grants or otherwise until after the year 1863, by reason whereof the pretended taxes paid by plaintiff's assignor were illegal, and, therefore, are not recoverable from this defendant.

8. That subsequent to the payment by it of the taxes on said lands, as in the petition alleged, and before its alleged assignment of the alleged cause of action herein to plaintiff, said Dubuque & Sioux City Railroad Company conveyed all of its right, title, and interest in said lands by warranty deed, containing among other covenants a covenant against incumbrances to said Iowa Homestead Company, whereby it assigned all right and claim that it then had to or on account of said taxes to said homestead company, and plaintiff, as its assignee, is estopped from claiming the same.

9. That on the — day of ——, 1868, plaintiff assignor, the Dubuque & Sioux City Railroad Company conveyed all of said lands by deed of general warranty, containing covenants, among other things, against incumbrances, to the Iowa Homestead Company, a corporation created and existing under and by virtue of the laws of the State of Iowa; and that, in an action in which the said home-

stead company was plaintiff and this defendant and others were defendants, commenced in the district court in and for the county of Webster and State of Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company asserted and maintained the right of recovery of this defendant of the same taxes, the recovery of which was sought herein and other taxes, the alleged right of recovery of which was based upon the same title and state of facts and involved the same questions of fact and law. That one of the issues made by the pleadings and determined by the proofs in said action was as to the right of said homestead company to recover said taxes, and that it was therein determined and adjudged finally by said last-named court, at the December term thereof, A. D. 1872, that the said homestead company was not entitled to recover the same or any part thereof; which said determination and judgment has never been in any manner set aside, vacated, or modified, and still remains in full force; that plaintiff's assignor had notice and full knowledge of the commencement and pendency of said action, and permitted and authorized the taxes on account of which recovery is sought herein, to be sued for [illegible]on in the name of said homestead company for the use of said assignor.

8 On the 15th of June, 1881, the plaintiff filed the following reply to defendant's answer.

As to the 3d paragragh thereof he admits the same to be true from the beginning to the words "known as the railroad grant," and as to the rest of said paragraph he denies the same and each allegation thereof.

As to the 4th, 5th, 6th, and 7th paragraphs of said answer he denies each and every part thereof.

As to the 8th paragraph he admits that the Dubuque & Sioux City Railroad Company conveyed all of its right, title, and interest in said lands by warranty deed, containing, among other covenants, a covenant against incumbrances to said Iowa Homestead Company, but as to all the rest of said paragraph he denies the same.

As to the 9th paragragh he denies each and every part thereof, and asks relief as heretofore.

9 On the 4th day of March, 1884, this cause coming on for hearing, plaintiff, to maintain the issue on his part, offered and read in evidence the following:

1. *Agreement.*

STATE OF IOWA, *County of Webster,* } *ss:*

In the Circuit Court of said Webster County, Iowa.

EDWARD K. GOODNOW *vs.* EDWIN C. LITCHFIELD, } No. 2237.

It is hereby stipulated and agreed that the plaintiff in the above-entitled suit may read in evidence at the trial of said suit the sec-

ond, third, and fourth sections or paragraphs on pages 26 and 27 of the printed abstracts in the case of Edward K. Goodnow *vs.* Edwin C. Litchfield in the supreme court of Iowa, October term, 1880, as being true of and applicable to the lands mentioned and described in the said petitions in said above-entitled suits, the last line in the third paragraph being changed so as to read "said company, prior to the year 1861, conveyed to the said several defendants, respectively, the lands mentioned and described in each petition in said several above-entitled suits," and the first line in the fourth paragraph so as to read "said several defendants and their said grantors."

It is further agreed that the plaintiff may read in evidence at the trial of the above-entitled suit certified or sworn copies by the treasurer of Webster county from the books, records, or official papers in his office relative to the payment of taxes on any of the said lands mentioned in the petition in said suit for the years from 1861 to 1871, both inclusive, or any of them.

BARCROFT, GATCH & McCAUGHAN,
Attorneys for Defendant.

10 The following are paragraphs second, third, and fourth, referred to in above argument, as changed:

Second. All of said lands lie within five miles of the Des Moines river, in the alternate odd-numbered sections above the Raccoon forks of said river, and were, prior to May 3, 1858, certified and approved to the State of Iowa under the act of Congress of August 8, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory."

Third. On the 3d day of May, 1858, pursuant to a sale thereof previously made, and an act of the General Assembly of Iowa, passed March 22, 1858, entitled "An act disposing of the grant of land made by an act of Congress granting land to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, and a joint resolution of said General Assembly, adopted on the day and year last aforesaid, entitled "Joint resolution containing proposition for a settlement with the Des Moines Navigation & Railroad Company," the State of Iowa, by its deed or patents granted and conveyed of all of said lands to the Des Moines Navigation & Railroad Company, a corporation duly organized, created, and established under the laws of the State of Iowa, and subsequently thereto and prior to the commencement of this suit said company, prior to the year 1861, conveyed to the said several defendants, respectively, the lands mentioned and described in each petition in said several above-entitled suits.

Fourth. Said several defendants and their said grantors prior to March 2, 1861, claimed title in fee simple to all of said lands under said act of Congress of August 8, 1846, and the certification, approval, and conveyance aforesaid thereunder and constantly since March 2, 1861, has claimed title to said lands under the joint resolution of Congress of that date and the act of Congress of July 12, 1862, and prior to December, 1858, the same were considered and

treated by the agents and officers of the United States and the State of Iowa as having passed to said State under and by virtue of said act of Congress of August 8, 1846.

2. Abstract of taxes, certificate of treasurer showing the levy and assessment and the payment by the plaintiff's assignor, the Dubuque & Sioux City Railroad Company, of the following amounts of taxes on the lands described in plaintiff's petition for the years 1861–2–3, respectively:

For 1861, paid October 31, 1886, $2,522.71; for 1862, paid December 9, 1863, $1,070.06; for 1863, paid January 20, 1864, $1,013.41.

11 Defendant, further to maintain the issue on his part, put in evidence the follwing stipulation and evidence:

Stipulation.

It is agreed for all the purposes of the trial of this case, that the following portions of the printed record in the case of the Iowa Homestead Company *vs.* the Des Moines Navigation & Railroad Company and others, heretofore pending in the Supreme Court of the United States, and decided at the December term thereof, A. D. 1866, may be used on the trial of this cause with the force and effect of original evidence.

GEORGE CRANE,
Attorney for Plaintiff.
C. H. GATCH,
Attorney for Defendant.

12 In the District Court of Webster County, Iowa.

IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD CO., EDWIN C. LITCHFIELD, Electus B. Litchfield, Samuel G. Wolcott, and others, and Roswell S. Burrows.

To said defendants above named:

You are hereby notified that there is now on file in the office of the clerk of the district court of Webster County, Iowa, the petition of plaintiff aforesaid, claiming of you that the said Iowa Homestead Company, is in possession and has the legal title to certain lands in the alternate sections, within five miles of Des Moines river, above the Raccoon fork. That you claim is some way an adverse title thereto, that you be enjoined from prosecuting actions at law, or pre-emptions to said lands, to quiet the plaintiff's title, and for other relief. You are also notified that unless you appear thereto and defend before noon of the second day of the term of the said district court of Webster county, to be held on the 12th day of October, 1868, a default will be entered against you and judgment rendered thereon.

IOWA HOMESTEAD COMPANY.
GRANT & SMITH, *Attorneys.*

DES MOINES, IOWA, 10*th October*, 1868.

Accepted service for the defendants, the Des Moines Navigation & Railroad Company, and Edwin C. Litchfield, and Electus B. Litchfield.

J. BROWN,
Agent for Defendants.

At chambers, city of Davenport, Scott county, Iowa.

Ordered that a temporary writ of injunction do issue, as prayed, on plaintiff's filing bond in penal sum of $500, conditioned as required by law, and the sureties to be approved by the clerk of Webster county, Iowa, district court.

Dated 1st day of October term, A. D. 1868.

JOHN F. DILLON,
Chief Justice Supreme Court, Iowa.

THE STATE OF IOWA

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edwin Wade, John Stryker, The Des Moines Valley Railroad Company, *et al.*

Whereas the Iowa Homestead Company has filed in our district court, for the county of Webster, a petition claiming that the said homestead company, a corporation created by the laws of Iowa, has the legal title to the lands, (which are mentioned and described in plaintiff's petition) and that you, or some of you have
13 brought and intend to bring certain actions at law, against persons in possession of said lands, to divert the title of said Iowa Homestead Company, and that you or some of you are about to prove up and claim pre-emptions on some of the lands which are named (in said petition) and has prayed in said bill to grant them title to said lands.

Now these are to command you and each of you, your agents, attorneys, servants, that you do wholly refrain from prosecuting said actions at law, or either of them, and that you wholly refrain from further applying for or proving up pre-emptions on any of said lands until the further order of our said district court for the county of Webster. And you will disobey this writ at your peril.

Witness and in testimony I, W. Lumpkin, clerk of the district court, have hereunto subscribed my name and affixed the seal of said court, at office in Fort Dodge, this sixth day of October, A. D. 1868.

W. LUMPKIN,
Clerk District Court.

Accepted service of the within writ for the defendants, the De-

Moines Navigation & Railroad Company, Edwin C. Litchfield, and Electus B. Litchfield.

J. BROWN,
Agent of said Defendants.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

In this cause come the defendants, Litchfield and John Stryker, and file their affidavit, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa, under certain acts of Congress of the United States, and the court being satisfied that the said affidavit and petition are sufficient under the law, and said bond being approved by the court, it is ordered that this cause be transferred to said circuit court of the United States for the district of Iowa, as to said defendants *in re*, and the clerk of this court is ordered to make the proper papers for said transfer.

STATE OF IOWA, }
Webster County, } *ss:*

THE IOWA HOMESTEAD COMPANY
vs.
EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, and JOHN STRYKER, impleaded with Roswell Burrows, the Des Moines Navigation & Railroad Company, and others.

I, John Brown, of Des Moines, in the county of Polk, in said State, being duly sworn, do depose and say that I am the agent of the defendants Litchfield and Stryker in the above-entitled action; that the same is now pending in the district court of Webster county, Iowa; that the said defendants, for whom I am agent as aforesaid, are citizens of the State of New York, and that the plaintiff is
14 a citizen of the State of Iowa; that the matter in controversy and dispute between this plaintiff and each and every of the defendants exceeds the sum of five hundred dollars, exclusive of costs; that I have reason to believe and do believe that from prejudice and local influence said defendants will not be able to obtain justice in the State courts of Iowa, in which this action is pending and untried.

JOHN BROWN.

Subscribed and sworn to by John Brown before me this 15th day of May, A. D. 1869.

GEORGE B. CORKHILL, *Clerk.*

Know all men by these presents that we, Edwin C. Litchfield and Electus B. Litchfield, and John Stryker, as principals, and John Brown, as surety, are hereby held and firmly bound unto the Iowa

Homestead Company in the penal sum of one hundred dollars, lawful money of the United States, to the payment of which well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this is such that if the said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, shall enter or cause to be entered in the circuit court of the United States, to be held in and for the district of Iowa, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the district court of the county of Webster and State of Iowa, in which the Iowa Homestead Company is plaintiff and said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, impleaded, etc., are defendants, and shall do such other appropriate acts as by the act of Congress approved July 26, 1866, entitled an act for the removal of causes in certain cases from State courts, are required to be done upon the removal of a suit into the United States courts, then this obligation to be void, otherwise of force.

EDWARD C. LITCHFIELD.
ELECTUS B. LITCHFIELD.
JOHN STRYKER.
JOHN BROWN.

Petition for Removal.

To the district court of Webster county, Iowa :

The petition of Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, defendants in the above-entitled action, respectfully show that they are citizens of the State of New York ; that this action is now pending in the district court of Webster county, Iowa; that the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further show that they have in this court their affidavit as required by the act of Congress approved
15 March 2, 1867, entitled "An act to amend an act entitled an act for the removal of causes in certain cases from the State courts, approved July 27, 1866."

And your petitioners file this petition praying for the removal of this suit into the next circuit court of the United States to be held in and for the district of Iowa, and they herewith offer the surety required by the said above-entitled act.

D. O. FINCH AND
J. M. ELLWOOD,
Attorneys for Defendants, Litchfield and Stryker.

This affidavit, bond, and petition are filed in place of the original filed in district court of Webster county, 13th October, 1868, the same appearing to be lost and not returned.

GRANT, *for Plaintiff.*
J. M. ELLWOOD,
For Litchfield and Stryker.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

OCTOBER 16, 1868.

And now on this day comes the defendants, Crouse, McDermott, and Cotter, by their attorney, G. Parsons, and files a motion to dissolve the injunction, which, coming on to be heard, and the court being fully advised in the premises, said motion is sustained as to them; whereupon this cause is ordered transferred to the circuit court of the United States as to other defendants.

Webster District Court.

OCT. 13, 1868.

In this cause the defendants, Litchfield and Stryker, come and file their affidavits, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa, under certain acts of Congress of the United States, and the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court, it is ordered that this cause as to the said defendants be transferred to said circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer.

Mr. Clerk, please make the above entry in this cause, and the further entry, that as to other defendants the cause is continued by agreement.

GRANT, *for Plaintiff.*

The foregoing original notice, acceptance of service, order of Dillon, justice, writ of injunction, and acceptance of service thereof, were read in evidence by plaintiff; also the affidavit of James Grant as to the truth of the matters contained in the petition or bill of complaint in said homestead suit, which was in the words following:

16 STATE OF IOWA, *Scott County:*

I, James Grant, being duly sworn, depose on oath that I am one of the attorneys for the plaintiff; that the facts stated in the foregoing petition are all of them of record except the allegations of the interest and intent of the parties in the suit of Wolcott *vs.* The Des Moines Navigation Company. I have examined the records referred to in the bill and have been informed as to the facts about the Wolcott suit by parties who appeared to know them, and I believe the allegation of the bill to be true.

JAMES GRANT.

Sworn to and subscribed before me this 1st day of October, 1868.

JOHN F. DILLON,
Judge Supreme Court, Iowa.

State of Iowa, Webster County District Court.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

The petition of the Iowa Homestead Company shows:

That said company is a corporation duly created by the laws and a citizen of the State of Iowa, for the purpose of buying and selling lands in said State. That said plaintiffs, by deed of purchase, bearing date the 12th of November, 1863, acquired by and through the Dubuque & Sioux City Railroad Company, all the right of said company, the Dubuque and Pacific Railroad Company and the State of Iowa to about fifty thousand acres of land lying on the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856 and the Des Moines river grant of 1856.

It is admitted that the above described fifty thousand acres of land include and embrace all the lands mentioned and described in the petition of the said E. K. Goodnow in the suit now before this court.

And by said deeds and certificates the plaintiff acquired a title to almost twenty thousand acres of land in odd sections within said grants in Webster and Hamilton counties, west of said Des Moines river, a list of which ts hereto annexed and made part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river and claimed by the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, and its assigns and some title or claim to twenty thousand acres of land on the west side of the river is or has been made by the Des Moines Valley Railroad Company, a corporation created by and a citizen of the State of Iowa. * * *

On the 9th of June, 1854, the State made a contract with the Des Moines Navigation & Railroad Company, a corporation cre-
17 ated by the laws of Iowa, to improve the navigation of the river, and to convey to said corporation all the remaining lands belonging to the State under the act of 1846. * * *

After the settlement of the State with the Des Moines Navigation Company in 1858 the said navigation company conveyed certain parcels of the lands now claimed by the plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Francis A. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker. * * *

The said plaintiffs have been in possession of the lands claimed by them, themselves, or their vendees in contract since 1861. They have paid the taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title who has not paid them. * * *

The plaintiff says he has no adequate remedy for the grievances complained of except in a court of equity. He makes the Des Moines Navigation & Railroad Company, Samuel G. Wolcott, Wm. B. Wells, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, The Des Moines Valley Railroad Company, Thomas Cotter, Jacob Crouse, John B. McDermott parties defendants to this suit and prays for a writ of subpœna against them.

The plaintiff prays that said parties may be enjoined from prosecuting said actions or any other actions at law in relation to the title to possession of any of said lands until the final hearing of the bill that the injunction be made perpetual; that said defendants Cotter, Crouse, and McDermott be enjoined perpetually from prosecuting any pre-emption to any of said lands, that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted; that the plaintiffs may be quieted in their title and possession to said lands on both sides of the river, or, if the plaintiff's title to said lands is not the better title, and his title to the said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856, and 1862, that his title to an equal number of acres in lieu thereof be decreed and established; that an account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition thereof, and set apart and convey or relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12, 1862.

The State of Iowa being acting trustee to do justice in the premises and to convey to such party as may be established the true beneficiaries under said act; that, in the event of a decree that the plaintiff's present title or any part of it has failed, that the said
18 Des Moines Navigation & Railroad Company and its assigns may be decreed to repay to the plaintiff all the taxes which he has paid on said lands and interest thereon, and that said Des Moines Valley Railroad Company be decreed to release to the plaintiff all claims to the indemnity lands set apart to the plaintiff, and for such other relief as the nature of the plaintiff's case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

Comes the plaintiff, October 23, 1870, and, by leave of court and consent of counsel, files the following amendment to his bill, to wit:

Circuit Court of the United States, District of Iowa.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

The plaintiff, by leave of court and agreement of counsel, amends

his description of the property in dispute by adding after the first clause of the bill the following words:

That said lands in dispute and claimed by the Des Moines Navigation & Railroad Company and its assignees are the odd sections in townships 86, 87, and 88, ranges 27, 28, 29, and 30 west, which lie south of the second correction line, within five miles of the Des Moines River, and' townships 89, 90, 91, and 92, ranges 28, and 29, east of the Des Moines river, within five miles of the east branch thereof.

The lands to which the Des Moines Valley Railroad Company makes some claim are the odd-numbered sections in townships 89 and 90, ranges 28 and 29, which lie west of the Des Moines river and within five miles thereof.

GRANT & SMITH.

This amendment, being made to correct and simplify a description of the lands in controversy, is conceded to be true without formal answer.

Part of the Answer of William B. Wells, Defendant in said Suit.

United States Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus Litchfield, Edward Wade, John Stryker, and others, Defendants.

The Several Answer of the Defendant, Wm. B. Wells, to the Bill of Complaint of The Iowa Homestead Company, Complainant.

19 * * * And this defendant, further answering, denies that the title of the claimant to the lands claimed by these defendants and by the Des Moines Navigation & Railroad Company and its grantees is superior and paramount to that of the said company and its grantees, and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained, as against the said Des Moines Navigation & Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees, respectively.

And this defendant, further answering, says that as to whether or not the said complainant and its vendees have been in possession of and paid taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed, save by the said complainant's bill of complaint, but he expressly avers that the possession of the said lands by the said complainant and its vendees since 1861 is and has been unauthorized and wrongful and that the said complainant should be required to account for the use and rents and profits thereof to the proper owners, respectively,

during the time they have been in such possession; and he also expressly alleges and avers that all taxes whatever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded.

And on this day, to wit, the 2d day of August, 1869, come the defendants, the Des Moines Navigation & Railroad Company; Samuel G. Wolcott, E. C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, by Elwood, solicitor, and file in said cause the following answer to complainant's bill of complaint, to wit:

United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, William J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, Defendants to the Bill of Complaint of the Iowa Homestead Company, Complainant.

These defendants, the Des Moines Navigation & Railroad Company; Samuel G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or to so much and such parts and portions thereof as these defendants are advised is material for them to make answer unto, answer and say that the foregoing and annexed answer of Wm. B. Wells herein, save as herein otherwise stated and set forth, truly and correctly set forth all the facts and contains all the averments and allegations relied upon by these defendants and each and every one of them as a defense to the said complainant's bill of complaint; that the said answer of said Wells and the admission and denials and affirmative allegations therein contained are true, to the best knowledge and belief of these defendants, and that these defendants adopt the said answer of the said Wells as the answer to the complainant's said bill of complaint, save and except as herein otherwise stated and set forth.

And these defendants, further answering, allege and aver that all the lands in and by the complainant's bill claimed to be in dispute by and between the complainant and these defendants were by the State of Iowa duly granted and conveyed to the said Des Moines Navigation & Railroad Company by the State of Iowa as in the said answer of the said Wm. B. Wells fully stated and set forth, and that subsequent to such conveyance by the State to said Des Moines Navigation & Railroad Company the said company bargained, sold,

granted, and conveyed to these defendants, respectively, separate and distinct tracts and parcels of said lands claimed by complainant, as will more fully appear by reference to the deeds or conveyances executed by said company to these defendants, respectively, and to which several deeds for greater certainty these defendants pray leave to refer, and that each and every of these defendants is a *bona fide* purchaser under the State of Iowa of the tract or tracts, respectively, conveyed to him by said company, and that he has full, complete, and indefeasible title thereto.

And these defendants deny that the said complainant is entitled to the relief claimed in his bill of complaint or any part or portion thereof, and aver and insist that by reason of the matters above and in the said answer of Wm. B. Wells, adopted and made a part hereof, contained the title of these defendants to the lands in dispute claimed by them, respectively, is perfect and absolute; all which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and they pray that their separate titles to the tracts claimed by them, respectively, may be confirmed and approved and declared valid, and that they be hence dismissed with their costs herein most wrongfully sustained.

FINCH & RIVERS AND
J. M. ELLWOOD,
Attorneys for Defendants Above-named.

And on the 13th day of May, A. D. 1870, there was filed in said cause the following stipulation of parties:

21 United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and others.

It is stipulated and agreed that the joint and several answers of the defendants, Albert H. Tracy, Francis Tracy, and Harriet Tracy, verified by Albert H. Tracy, the several answers of the defendant, Wm. B. Wells, sworn to by said Wells, and the joint and several answers of the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, John Stryker, and the Des Moines Navigation & Railroad Company, sworn to by Electus B. Litchfield and Nathan J. Higbee, be deemed and taken as the answer of the several defendants herein, and that all previous answers of the said defendants verified by their solicitors and filed herein be withdrawn from file.

To the several preceding answers the plaintiff filed a formal replication, putting in issue the several averments therein contained:

Stipulations Between the Parties.

In the Circuit Court of the United States.

IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES VALLEY RAILROAD COMPANY *et al.*

It is agreed that the only questions submitted on this hearing are:

1. In which of the parties is the paramount title to the lands in controversy.

2. If the title shall be adjudged to be in the defendant, The Des Moines Navigation & Railroad Company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands?

The amount of taxes paid is admitted to be $2,000. If the court shall find that the plaintiff is entitled to be reimbursed, the question of amount to be reimbursed shall be referred to a master and the defendants shall have the right to show any counter claims or matters which should be considered as reducing the amount to be reimbursed.

It is admitted that D. W. Kilborne was a director in the Des Moines Valley Railroad Company from 1862 to 1867. It is admitted that the Dubuque & Sioux City railroad was completed to Sioux City July 4, 1870.

GRANT & SMITH,
Attorneys for Plaintiffs.
WITHROW & WRIGHT,
For D. V. R. R. Co.
S. L. STRONG AND
WITHROW & WRIGHT,
For D. M. V. R. R. Co.
C. C. NOURSE,
For R. S. Burrows.

22 And afterwards, to wit, on the 31st day of May, 1871, the following decree was rendered in said cause by said circuit court:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al.*

This cause came on to be heard at the May term, 1871, of said court, Grant & Smith for the plaintiff, and Ellwood, Nourse & Withrow for the Des Moines Navigation & Railroad Company and purchasers, and Withrow & Strong for the Des Moines Valley Railroad Company; and the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits, and depositions.

And thereupon it was ordered, adjudged, and decreed that the

plaintiff's bill as to the lands in townships 86, 87, and 88, ranges 27, 28, 29, and 30 east and west of the Des Moines river and south of the second correction line, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, and the bill for relief for indemnity lands in lieu thereof, be dismissed.

And the bill for relief as to the lands in townships 89 and 90 north, ranges 28 and 29 west, on the west side of Des Moines river, be dismissed without prejudice, and that the plaintiffs pay the costs.

The following agreement was filed in said cause by the parties on the 20th day of October, A. D. 1871:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY and Others.

It is agreed between the counsel for the complainants and defendants, who have appeared and answered, that the foregoing case was tried in the circuit court upon the bill, amendments, answers, replications, exhibits, and depositions offered by plaintiff and defendant at and in the foregoing record, which the parties agree to examine and correct when printed.

It is further agreed that the plaintiffs have all the title to the property in dispute which lawfully belonged to the Dubuque & Pacific Railrod Company or Dubuque & Sioux City Railroad Company, its assignee.

It is also agreed that either party shall be authorized to read, either in the court below or in the supreme court, all acts, resolutions, and memorials, journals or public documents of Congress or the State of Iowa, which relate to the matter in controversy, without offering them formally to the court, and use them in argument by proper reference.

It is also agreed that if either has omitted from their record any public record of the State or United States which relates to the matter in controversy the same may be read and considered in the appeal court by furnishing the adverse party with notice thereof
23 thirty days before argument, the object of both parties being to obtain a final adjudication of the questions made in the issues between the parties, or all the facts which belong to the same. And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, each and every of whom are citizens of New York, and The Des Moines Navigation & Railroad Company duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants, Wm. B. Wells and Albert Tracy, on file herein and duly verified by them, respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants, respectively, in the land in controversy in this action.

And it is further stipulated and agreed that the said answer of defendant, William B. Wells, verified by him, with the necessary changes, alterations, and variations to show and present the proper and respective interest of defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker, and Des Moines Navigation & Railroad Company shall be taken, treated, and deemed the answer of said last-named defendants herein.

J. M. ELWOOD,
For all the Defendants Represented.
WITHROW & WRIGHT,
For all the Defendants they Represent, except The Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

In the Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY *et al*

To prevent unnecessary incumbrance of the record in this cause it is stipulated that the evidence in the court below established the following facts:

That on the 7th day of April, 1863, there was certified to the State, to aid in the construction of the Dubuque & Pacific railroad, lands as follows:

Acres.
56,473.32
21,061.91
1,382.42
78,917.25

And the 13th December, 1864, 159.60.

That the lands certified on the 27th day of December, 1858, embraced none of the lands in dispute in this controversy and no lands lying in odd-numbered sections within five miles of the Des Moines river.

24 That the lists made on the 7th of April, 1863, and the 13th of December, 1864, embraced the lands in dispute, except indemnity lands, and all were in odd-numbered sections, within five miles of the Des Moines river. * * *

(Signed) WITHROW & WRIGHT,
For the Des Moines Navigation & Railroad Company and The Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

And on this day, to wit, the 13th day of May, in the May term, A. D. 1870, of said court, in the records of the proceedings thereof in said entitled cause, there appears the following entry, to wit:

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, *et al.*, Defendants.

This action was commenced in the district court of Webster county, Iowa, at the October term of said district court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavit, bond, and petition asking the removal of this action from said district court to this court, under the provisions of the act of Congress, approved March 2, 1867, entitled An act to amend an act for the removal of causes in certain cases from the State courts, approved July 27, 1866.

And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were non-residents of the State of Iowa and residents of the State of New York, and that their application for the removal of this cause to this court is in all respects conformed to the requirements of said act of Congress, the said district court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court as to the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and this cause as to said defendants removed to this court for trial.

And it appearing that the defendants, Samuel G. Wolcott, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade are each and every of them now residents of the State of Iowa and district of Iowa, and under the statute above referred to are also entitled to a removal of this cause from the State court, and that the said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action.

25 And it further appearing to this court that the defendants so asking to be made parties claim and hold under the same title as defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, their defense is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill, and that by their appearance and answer herein the said persons be deemed and treated as defendants herein and their rights in the premises adjudicated in and by this court in this action.

The deposition of JOHN B. THOMPSON, as follows:

I have sustained no official or business relation with the Dubuque & Sioux City Railroad Company, except that I have been a stockholder. I was the secretary and treasurer of the Iowa Homestead Company during its existence—from 1864 to June, 1873. I don't know anything about Mason Thompson's connection with the Dubuque & Sioux City Railroad Company. I know there is such a man as Mason Thompson. I do not know in respect to his connection with the railroad company referred to in the question. The homestead company had its regular board meetings as long as I was connected with it—up to June, 1873. I know of no meetings independent of the board meetings after 1873.

Soon after Jesup became president of the Dubuque & Sioux City
Railroad Company the railroad company became owner of
26 five-ninths of the stock of the homestead company, and after
such change of ownership of the stock there was a new board of directors made of the homestead company. Morris K. Jesup, D. Willis James, J. Pierpont Morgan, and J. A. Roosevelt, George J. Forest, Edward Stimpson, and Isaac H. Knox were directors in the companies. The railroad company owned a majority of the stock of the homestead company since the year 1866. I cannot say exactly what date. It was soon after the time that Morris K. Jesup became president of the railroad company; it might have been within two months or within a year of that date. By owning a majority of the stock they controlled the homestead company, and they worked harmoniously with our board. I know that after Jesup became president of the railroad company all stock of the homestead company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock. I think it was within a year afterwards, but am not positive. In June, 1873, I sold the railroad company my stock, 560 shares, and took the Dubuque & Sioux City Railroad Company's notes, payable in one, two, three, and four years, and, as secretary of the company, I can say they purchased at the same time the balance of the stock that was held by other stockholders other than the railroad company on the same terms. As to how much of the stock was owned by the railroad company on the 1st of October, 1868, I cannot answer for the reason that I cannot fix the time when Jesup became president, and by whom the stock has been held since June, 1873, I cannot answer, except as above. Soon after Jesup became president there was transferred to the railroad company five-ninths of the entire stock of the homestead company, and in June, 1873, as before stated, the railroad company purchased from me and other owners the balance of the stock, making the entire stock of the homestead company. I think it was shortly after Jesup became president.

Question. State whether or not there was an agreement be-
27 tween said railroad company and said homestead company that,
in case of failure of the title to the Webster county lands purchased by the latter of the former, *that* the railroad company would pay back to the homestead company the original cost with ten per

cent. interest thereon; and, if so, whether or not any record or memoranda of such agreement was or should have been recorded in the books of both or either of said companies; and, if so, in what book or books.

Answer. There was an agreement to that effect amongst the Iowa Homestead Company's papers. I don't think it was recorded in any book at all.

Ques. Is it or is it not true that said railroad company paid the cost and expenses of the litigation in the case of the Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company, commenced in the district court of Webster county, Iowa, in October, 1868, and taken by appeal to the Supreme Court of the United States, to settle the question of title as to said Webster county lands? State fully all you know with respect to the payment of said costs and expense; whether paid in full by said railroad company or jointly by said railroad company and said homestead company; and, if jointly, in what proportion the same were paid by them; and state further whether or not the matter of the payment of said costs and expenses or provision therefor was considered or discussed at any meeting of the board of directors of either of said companies at which you were present; and, if so, state whether or not both of said companies were represented at such meeting, and if not both whether or not said railroad company was represented at such meeting.

Ans. I cannot answer whether they paid them or not. They agreed to defend the title. The Iowa Homestead Company never paid a dollar of the expenses. It was never discussed at the Iowa Homestead Company's meetings, and I know nothing about what was done in the railroad company's meetings. I have already stated that the railroad company owned a majority of the stock of the homestead company, and we were working harmoniously.

28 W. J. BARNEY's deposition, as follows:

I was land agent for the Iowa Homestead Company from its organization up to some time in 1873. I have had no official relation at any time with the Dubuque & Sioux City Railroad Company.

Ques. State whether or not you had at the time of and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies, respectively, and in which said homestead company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was and was to be commenced.

Ans. I had nothing to do with the suit mentioned, although I think it was mentioned to me that such suit would be brought. I neither directed nor participated in the direction of said suit. I don't recollect now exactly who were the officers of the Iowa Homestead Company at the time, but believe they were Morris K. Jesup, president, and John B. Dumont, secretary and treasurer; as to the

directors I have forgotten who they were; as to the officers of the railroad company, cannot say.

I don't think the Iowa Homestead Company paid taxes for 1861, '2, and '3. I think I paid all their taxes and my accounts don't show that I paid such taxes for them.

29 GEORGE J. FOREST'S deposition, as follows:

I have been a stockholder in the Dubuque & Sioux City Railroad Company for many years. I have no interest in its property to-day. I was not a director. I or my firm were stockholders in the homestead company, and I have been told that I was a director and an officer. I have no distinct recollection of my official capacity in the company.

Ques. State whether or not you had at the time and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against
30 the Des Moines Navigation & Railroad Company and others, for the purpose of trying the title to certain lands lying in Webster county, Iowa, claimed by said companies, respectively, and in which said homestead company sought as alternative relief the recovery of certain taxes paid by the said homestead company, knowledge of the fact that said suit was or was to be commenced.

Ans. I have no recollection of any such suit.

Ques. State whether or not if you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present and when were said assignments or either of them made.

Ans. I was not present. I do not know whether Goodnow was present or not.

Ques. State whether or not you arranged with said Goodnow for the making to him of either of said assignments; and, if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claim so assigned to him or either of them.

Ans. I did not.

Ques. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made, whether or not it was authorized at and by any meeting of the stockholders, directors, or of any committee of the assignor; and, if so, by which, and when and where was such meeting held, and who composed the same.

Ans. I know nothing about it.

MASON THOMPSON'S deposition, as follows:

I am a director of the Dubuque & Sioux City Railroad Company. I have been connected with such direction four or five years. I am also a director of the Iowa Homestead Company and have been so during the same period. I acted as president *pro tem.* of that company for a short term during the absence of the president.
31 The board of directors of the Iowa Homestead Company have not held any separate meetings as such, and the directors of

both companies are the same persons. I understand that the railroad company owns a majority of the stock of the homestead company, and has controlled its affairs ever since my connection with the company, and as the railroad company owns the lands any discussion in regard to them or any matters in reference to the homestead company have been had at the meetings of directors of the Dubuque & Sioux City Railroad Company.

Ques. State whether or not you had at the time of or previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation & Railroad Company and others for the purpose of trying the title to certain lands lying in Webster county, Iowa, claimed by both companies respectively, in which said Iowa Homestead Company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was or was to be commenced.

Ans. I do not know anything about any of these matters of eight years ago.

Ques. State where the plaintiff, Edward K. Goodnow, resides, and what official or other business relation, if any, he sustains to the said homestead or said railroad company.

Ans. He is a partner of Mr. Jesup, who is president of the Dubuque & Sioux City Railroad Company, and has an office with him. I do not know where he resides. I do not know that he is officially connected with either of said companies. I know he is not an officer or director of either of said companies.

Ques. State whether or not you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when and where were said assignments or either of them made.

32 Ans. I know nothing in respect to the matters inquired of.

Ques. State by what authority the assignment of the cause of action herein to the plaintiff, Goodnow, was made; whether or not it was authorized at and by any meeting either of the stockholders, directors, or any committee of the assignor, and, if so, by which, and when and where was such meeting held, and who composed the same.

Ans. I know nothing in respect of the matters so inquired of, and cannot answer that question.

Ques. State, if you can, which of said companies, the homestead company or the railroad company, furnished the money in the first instance with which the taxes on the said Webster county lands for the years 1861, '62, and '63, and each thereof were paid, and whether or not the same was so furnished for the use of the company so furnishing the same, and if not, for whose use was it furnished, and what adjustment, if any, was subsequently made with respect thereto.

Ans. I have no personal knowledge in respect to this matter inquired of. The matter, however, has been talked over at the meetings of the board when I was present, and I understood from these

conversations that the matter was referred to the officers for them to bring suit and to take whatever measures were necessary. I supposed the taxes had been paid and these suits were for the purpose of recovering them back. This occurred in the meeting of the board of directors of the Dubuque & Sioux City Railroad Company. These conversations referred to have occurred within the last three or four years.

John B. Thompson's Deposition. Filed November 19, 1881.

I have never had any connection with the Dubuque & Sioux City Railroad Company. I was, however, secretary and treasurer of the Iowa Homestead Company from 1864 to 1873.

Question. State whether or not you had at the time of and previously to the commencement of this suit in the district court
33 in Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others, for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies, respectively, and on which said homestead company sought as alternative relief the recovery of certain taxes paid by said homestead company, knowledge of the fact that said suit was and was to be commenced.

Ans. I have no knowledge of there being any disputed title to the lands. I cannot now recollect whether I had knowledge of the fact that such suit was or was to be commenced.

Ques. If, in answer to the last interrogatory, you say you had knowledge of the suit therein referred to at the time of its commencement, state whether or not you directed or participated with others in directing its commencement; and, if so, state the names of all the officers of said homestead company and said Dubuque & Sioux City Railroad Company, as far as you can remember, with whom you consulted about the commencement of the same before it was commenced.

Ans. I cannot answer clearly. I suppose it must have been by action of the board directing the secretary and treasurer to bring the suit. Not having the books I cannot make any reference to them. I know that there were no entries on our books for taxes of 1861, 1862, and 1863. The Iowa Homestead Company paid the taxes regularly from 1864 up to 1873, when my connection with the company terminated. I cannot answer where they (the tax receipts) are now. I gave them up in 1873 to the Dubuque & Sioux City Railroad Company. I think there were no taxes paid by the homestead company to my recollection from 1859 till 1864.

I only know him (the plaintiff, Edward K. Goodnow,) as a partner of Morris K. Jesup & Co. I do not know him in connection with either of these companies.

I know nothing about the assignment of the claim sued upon to plaintiff, and was not present when it was made; don't know by what authority it was made.

34 The Iowa Homestead Company held a warrantee deed from the Dubuque & Sioux City Railroad Company, and in addi-

tion they held an agreement that they (the railroad company) would defend the title at their own expense, which they did.

MORRIS K. JESUP'S deposition, as follows:

I am president of the Dubuque & Sioux City Railroad Company and have been since the early part of 1866. I have no relations with the Iowa Homestead Company officially, and never have had.

Question. Who on behalf of said railroad company had the chief control and direction of said suit, and who employed, consulted with, and generally gave instructions to the attorneys who had charge of it?

Answer. I am president; and I presume if any directions were given, I must have given them; I do not know.

He (Edward K. Goodnow, the plaintiff) resides in Brooklyn. I am not aware that he sustains any official relations with either the land company or the railroad company.

Ques. State whether or not you were present when the assignment by either said homestead company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when were said assignments or either of them made.

Ans. I do not recollect anything about it.

Ques. State whether or not you arranged with said Goodnow for the making to him of either of said assignments; and, if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claims assigned to him, or either of them.

Ans. Not that I remember; I have recollection of any arrangement between Mr. Goodnow and the Iowa Homestead Company or the railroad company at all.

Ques. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or not it was authorized at and by any meeting, either by the stockholders, directors, or any committee of the assignor; if so, by which, and when and where was such meeting held; who composed the same.

Ans. I have no recollection of anything of the kind. I presume, however, if anything of the kind was done it was done by the board of directors. I remember nothing about it. I do not remember of any record of the proceedings authorizing said assignment having been made.

J. B. DUMONT'S deposition, as follows:

I have been assistant secretary of the Dubuque & Sioux City Railroad Company since some time in 1864, and treasurer since some time in June, 1876, and secretary of the Iowa Homestead Company since some time in 1873.

36 *Judgment.*

Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Iowa, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

April 28, 1873.

Stipulation.

It is agreed for all the purposes of the trial and decision of this cause that the following portions of the printed record in the cases of Samuel G. Wolcott *vs.* Des Moines Navigation & Railroad Company and Calvin Burr *vs.* Des Moines Navigation & Railroad Company, heretofore pending in the Supreme Court of the United States, decided at the December term thereof, A. D. 1886, may be used on the trial of this cause with the force and effect of original evidence.

GEORGE CRANE,
Attorney for Plaintiff.
C. H. GATCH,
Attorney for Defendant.

Pleas in the circuit court of the United States for the southern district of New York, held at the United States circuit court-
37 rooms, in the city of New York, in said district, of the term of April, in the year of our Lord one thousand eight hundred and sixty-five.

Witness the Honorable Samuel Nelson, Justice of the Supreme Court of the United States.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Des Moines Navigation & Railroad Company, being a corporation created by and under the laws of the State of Iowa and organized and residing in said State of Iowa, were summoned to answer Samuel G. Wolcott, a citizen of said State of New York, of a plea of covenant; and thereupon the said Samuel G. Wolcott, plaintiff, by Jasper W. Gilbert, his attorney, complains of the said The Des Moines Navigation & Railroad Company, defendants, of a plea of breach of covenant, for that whereas heretofore, to wit, on the eighth day of August, in the year of our Lord one thousand eight hundred and fifty-nine, at Des Moines, in the said State of Iowa, to wit, at the city of New York, in the said southern district of New York, by a

certain deed-poll then and there made by the said defendants, which said deed-pool, sealed with the seal of the said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid it was witnessed that the said defendants, in consideration of the sum of three thousand and forty dollars to them in hand paid by the said plaintiffs, did thereby grant and convey to the said plaintiff the following tract of land in said State of Iowa, to wit, in Webster county, the east half of section seventeen, in township eighty-eight, range twenty-seven, containing three hundred and twenty acres; and the said defendant, in and by the said deed-poll, then and there, in consideration of the money aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the said plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-
38 poll, did and would receive and take a good and perfect title in fee to the said tract of land as by the said deep-poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tract of land nor any part thereof, and that the said plaintiff did not then or there, or at any time afterwards, by reason of the said deed-poll or otherwise, receive, obtain, or take any title whatsoever to the said tract of land or any part thereof, but that the said defendants, to fulfill their said warranty of the title to said land and to cause the said plaintiff to receive, obtain, or take a good and perfect title in fee to the said tract of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected and refused, and still do neglect and refuse; of all of which the said defendants had notice, and so the said plaintiff in fact saith that the said defendants, although often requested, etc., have not kept the said covenants so by them made as aforesaid, but have broken the same, to the damage of said plaintiff of ten thousand dollars, and thereof the said plaintiff brings his suit, etc.

And the said defendants, by W. & C. Tracy and Tallmadge, their attorneys, come and defend the wrong and injury when, etc.; and as to the supposed breach of covenant above assigned and alleged by the said plaintiff they, the said defendants, say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and at the time of the making of the said indenture in the said plaintiff's declaration above mentioned, were seized in fee of the said tract of land, and did then and there by the said indenture convey to the said plaintiff a good and perfect title in fee to the same, and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, etc. And for a further plea in this behalf the said defendants, by leave of the court here for the purpose first had
39 and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because

they say that the said defendants, after the making of the said indenture in the said declaration mentioned and before the commencement of this suit, to wit, on the 1st day of August, 1862, acquired and took a title and estate in fee in the said tract of land, which said last-mentioned title and estate, by the common law of the State of Iowa and also by the statute of the State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants, by the said indenture; and by means of the premises the said plaintiff, before the commencement of this suit, did receive and take good and perfect title in fee to the said tract of land; of all which the said plaintiff had notice, without this, that the said plaintiff has suffered any damage by means of anything in the said declarations mentioned; and this the said defendants are ready to verify.

Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, etc.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action, because he says that the said defendants, at the said time, when, etc., were not seized in fee of the said tract of land, nor did they convey to plaintiff any title thereto in any manner and form as in that plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, etc.

And the said defendants do the like.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that he, the said plaintiff, ought not, by reason of anything in the plea alleged, to be debarred from having or maintaining his aforesaid action thereof, because he says that the said defendants did not at the said time, when, etc., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatever in manner and form as in that plea alleged; and this the plaintiff prays may be inquired of by the country, etc.

And the said defendants do the like.

Therefore it is ordered that the issue above joined be tried at the next term of the said circuit court, to be held at the court-rooms in said district above mentioned, commencing on the third Monday of October next, the same day as given to the parties aforesaid.

Judgment.

In the Circuit Court of the United States for the Southern District of New York.

SAMUEL G. WOLCOTT
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

Afterwards, to wit, on the 27th day of October, in the term of October, in the year of our Lord one thousand eight hundred and sixty-

five, in the said circuit court, at the court-room thereof, in the city of New York, in said southern district of New York, before the Hon. Samuel Nelson, a justice of the Supreme Court of the United States, come *to* the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury being summoned, also came, who, to speak the truth in the matter aforesaid in issue, being chosen, tried, and sworn, say upon their oaths that the defense by the said defendants above pleaded is true, and they find and return a general verdict in favor of the defendants aforesaid.

Therefore it is considered by the court here that the said plaintiff take nothing by his said action, but that he be in mercy, etc., and that the said defendants go thereof without day, etc.; and it is further considered that the said defendants recover against the plaintiff the sum of twenty-seven dollars and thirty cts. for their costs and charges in and about their defense in this behalf expended, and that the said defendants have execution thereof.

Judgment signed this 31st day of October, A. D. 1865.

R. E. STILLWELL,
Deputy Clerk.

CITY AND COUNTY OF NEW YORK, *ss;*

In the Circuit Court of the United States for the Southern District of New York.

CALVIN BURR

vs.

THE DES MOINES NAVIGATION & RAILROAD COMPANY.

Calvin Burr, a citizen of the State of New York, complains of
41 the Des Moines Navigation & Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, and being in custody, etc., of a plea of breach of covenant, for that whereas heretofore, to wit, on the fifteenth day of November, in the year of our Lord, one thousand eight hundred and fifty-eight, to wit, at Des Moines, in said State of Iowa, by a certain deed-poll there and then made by the defendants, which said deed-poll, sealed with the seal of said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed that the said defendants, in consideration of the sum of seventeen thousand eight hundred and sixty-eight dollars and eighty cents to them in hand paid by the said plaintiff did thereby grant and convey to the said plaintiff the following tracts of land in said State of Iowa, to wit: All of section nine, in township eighty-nine, range twenty-eight, and all of section twenty-one, in township eighty-nine, range twenty-eight, containing together twelve hundred and eighty acres, and the said defendants, in and by the said deed-poll, there and then, in consideration of aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-poll, did and would receive and take a

good and perfect title in fee to the said tracts of land, and each thereof, as by the said deed-pool, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tracts of land or either thereof, nor any part thereof, and that the plaintiffs did not then or there, or at any time afterward, by reason of the said deed-poll or otherwise, receive, obtain, or take any title whatsoever to the said tracts of land or either thereof, but that the said defendants, to fulfill their said warranty of the title to said lands, and to cause the said plaintiff to receive, obtain,
42 or take a good and perfect title in fee to the said tracts of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected, and still do neglect and refuse; of all which the said defendants had notice, and so the said plaintiff in fact saith that the said defendants, although often requested to, have not kept the said covenants so by them made as aforesaid, but have broken the same, to the damage of the said plaintiff thirty thousand dollars, and thereof the said plaintiff brings his suit, etc.

J. W. GILBERT,
Attorney for Plaintiff.

And the said defendants, by Tracy & Olmsted, their attorneys, come and defend the wrongs and injury, when, etc., and as to the supposed breach of covenant above assigned and alleged by said plaintiff, then the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and after the time of making of the said indenture in said plaintiff's declaration above mentioned were seized in fee of the said tracts of land, and did then and there by the said indenture convey to the said plaintiff a good and perfect title in fee to the same, and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them, etc.

And for a further plea in this behalf the said defendants, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defendants, after making the said indenture in the said declaration mentioned and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tracts of land, which last-mentioned title and estate, by the common law of the State of Iowa, and also by the statutes of
43 the said State of Iowa, did forthwith enure to and vest in the said plaintiff as the grantee of the said defendants by the said indenture, and that by means of the premises the said plaintiff, before the commencement of this suit, did receive and take a good and perfect title in fee to the said tracts of land; of all which the said plaintiff had notice, without this, that the said plaintiff suffered any damage by means of anything in the said declaration

mentioned; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, etc.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, said plaintiff, ought not by reason of anything in that plea alleged to be bound from maintaining his aforesaid action, because he says that the said defendants, at the said time when, etc., were not seized in fee of the said tracts of land, nor did they convey to the said plaintiff any title thereto in manner and form as in that plea in that *belief* alleged; and this the said plaintiff prays may be inquired of by the country, etc.; and the said defendants do the like.

And the said plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that is the said plaintiff or not, by reason of anything in that plea alleged, to be bound from having or maintaining his aforesaid action thereof, because he says that the said defendants did not, at the said time when, etc., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatsoever in manner and form as in that plea alleged; and this the said plaintiff prays may be inquired of by the country, etc.; and the said defendants do the like.

J. W. GILBERT,
Plaintiff's Attorney.

44 Therefore the issues above joined are ordered by the circuit court of the United States for the southern district of New York to be tried at a stated term of said court appointed to be held at the city hall of the city of New York on the — day of ——, in the year of our Lord 1864, and place last above named, before Hon. —— Shipman, one of the justices of said court, according to the form of statute in said case made and provided.

United States Circuit Court, Southern District of New York.

Judgment.

CALVIN BURR
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

Came as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned, and the jurors of jury summoned to try the said issue being called also came, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say upon their oaths that the said defendant is guilty of the several breaches of covenant above laid to its charge in manner and form as the said defendant hath above in that behalf alleged against the said defendant, and the said jury assesses the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him in above, his suit, in this behalf expended,

to the sum of twenty-four thousand two hundred and fifty-five $\frac{16}{100}$ dollars, and for these costs and charges to six cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also thirty-eight and $\frac{55}{100}$ dollars for his costs and charges by the said court now here adjudged of increase to said plaintiff and with his assent, which said damages, costs, and charges in the whole amount to twenty-four thousand two hundred and ninety-four and $\frac{11}{100}$ dollars.

And the defendants in mercy, etc.

Judgment signed this 21st November, 1864.

R. E. STILLWELL,
Deputy Clerk.

The court then delivered to the jury the following charge:

GENTLEMEN OF THE JURY: You will see that the conclusions to which I have come upon the questions raised by the evidence in this case dispose of all except one, and that relative to the damages only, which I will submit to you. I therefore charge you—

45 1. That no title to the lands in question passed to the Territory of Iowa by virtue of the act of Congress, August 8, 1864, these lands lying above the Raccoon Forks of the Des Moines river. This point has been already settled by the Supreme Court of the United States in the case of the Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 of How. Rep., 66.

2. That none of the acts of the executive officers of the United States which have been proven, nor all of them taken together, had any effect to extend the operation of the act of August 8, 1846, over these lands, nor in any manner to confer a title to them, either at law or, strictly speaking, in equity, upon the Territory or State of Iowa, or upon these defendants. This result follows from the decision of the Supreme Court already cited.

3. That these acts of the executive officers of the United States proven and relied on in this case did not reserve to the United States these lands for the purpose of aiding in any other objects or internal improvements, or for any other purpose whatever, and therefore they are not drawn within the proviso of the act of May 15, 1856. Those of them which proceeded upon the idea that these land were embraced in the grant of August 8, 1846, were mere errors arising out of a misconstruction of the terms of that grant. They were, no doubt, made in good faith and for the purpose of formally fixing and defining rights supposed to have been already granted by Congress; but as these acts, according to the case, 23d How., 66, exceeded the grant made by Congress they were void. These acts were intended as acts of transfer and not acts of reservation. To now attribute to them the effect of having reserved these lands to the United States—that is, set them apart for the use of the Government itself, would be reserving the natural consequences originally intended to flow from them. Such a construction of these acts, I think, would be arbitrary and neither warranted by any circumstances presented by the evidence or by the settled rules of law. All

these acts, therefore, left the lands in question in the same
46 status in which they have always remained. That status was unchanged not only in fact, but in contemplation of law. The lands were neither sold, granted, nor reserved to the United States for any purpose, but remained in the great body of the public domain subject to the control of Congress and to the operation of the laws in force regulating the disposition of the public lands.

4. If these views are correct, then the lands in question were embraced in the body of the act of May 15, 1856, and the title passed by that grant to the State of Iowa in trust. The State took the lands in trust, and by an express provision of the act they were "to be applied to no other purpose whatever" than that of aiding in the construction of certain railroads therein named. It is unnecessary to say that the defendant's enterprise is not one of those named in the act as those to which the application of the lands granted is expressly restricted. Whethor or not a title *in presenti* passed to the State on the passage of this act I do not deem it necessary now to determine; but I think it is quite certain that that act placed these lands in such a position that they were not reached by the resolutions of Congress of March 2, 1861, and July 12, 1862, upon which the defendants reply. To conclude otherwise would be to hold that these joint resolutions repeal *pro tanto* without any express provisions—by implication merely—the public act of May 15, 1856. A construction by which the repeal of a statute by implication is sought to be established is never favored, especially where private rights are concerned.

5. These views being legal conclusions drawn from facts conceded in the case, or established by uncontradicted evidence, cover the whole controversy, except the question of damages. It is my duty, therefore, to direct you to find a verdict for the plaintiff and assess the damages which he has proven he has suffered from the failure of his title to these lands. The rule by which you will be guided will be the amount of the consideration paid, with interest from the day of payment to the present time at the rate of six per cent. per annum.

The defendant's counsel excepted to that part of the charge
47 concerning the effect of the act of August 8, 1846, contained in the second proposition or section of said charge; and also excepted to that part of the charge contained in the third proposition or section thereof; and also excepted to that part of the charge contained in the fourth proposition or section thereof; and also to that part of the charge contained in the fifth proposition or section thereof.

The court thereupon charged and instructed the jury to find a verdict for the plaintiff; to which charge and instructions the defendants' counsel excepted.

The jury found a verdict in favor of the plaintiff, and assessed his damages at $24,254.00.

And because the said several exception do not appear by the record of the said trial the said presiding judge, on the prayer of the

defendants, has set to this bill of exceptions his seal the third day of November, one thousand eight hundred and sixty-four.

[L. S.] WILLIAM D. SHIPMAN.

Filed November 21, 1864, bond for cost.

Docket Entries and Extracts from Minutes Supreme Court of the United States in The Des Moines Navigation & Railroad Company, Plaintiff in Error, vs. *Calvin Burr.*

Supreme Court of the United States. December Term, 1864.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, vs. CALVIN BURR. } No. 336.

In error to the circuit court of the United States for the southern district of New York.

Chas. Tracy; P. Smith, for intervener.

Docket entries:

1864, Dec. 10.—Record received and filed.

No. 221. December Term, 1865.

Docket entries continued:

1866, Feb. 8.—Motion of Mr. Allison for leave to intervene filed.

48 1866, Feb. 8.—Affidavit of J. M. McKinley filed.

" " 13.—Leave granted to the Dubuque & Sioux City R. R. Co. to intervene, etc.

1866, Feb 21.—Brief of P. Smith, for intervener, filed.

No. 133, of December Term, 1866.

Docket entries continued:

1866, Dec. 14.—Mr. J. F. Duncombe filed a motion to intervene, etc.

1866, Dec 17.—Leave granted Mr. Duncombe to appear and file printed argument.

1866, Dec. 17.—No. 204 to be argued with this case.

1867, Feb. 8.—Submitted with No. 204.

" May 13.—Reversed with costs and a venire awarded.

49 Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque & Sioux City Railroad Company, a corporation, etc., by Wm. B. Allison, its attorney, now comes and moves the court for leave to intervene in the above-entitled cause, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made part hereof.

DUBUQUE & SIOUX CITY RAILROAD COMPANY,
By WM. B. ALLISON, *Its Attorney.*

True copy.
Test: [L. S.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States. December Term, 1865.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

I, James McKinley, on oath say that I am an attorney and counselor at law, and am assistant attorney of the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the case above named; that the said railroad company are materially interested in obtaining a correct decision of the principal point raised in said cause, an that I verily believe a decision of the point against the above-named defendant in error would prejudice the interest of said Dubuque & Sioux City Railroad Company, although not a party to the record in the above-named case. The decision made by the court below (Hon. Wm. D. Shipman) is the point on which rests the
50 title to about seventy-seven thousand acres of land granted by Congress to aid in the construction of said Dubuque & Sioux City railroad; further, that I have reason to fear that said Burr is not a *bona fide* litigant, but, on the contrary, is desirous of obtaining a decision against himself with a view to prejudicing the title of the Dubuque & Sioux City Railroad Company and their grantees.

Signature to the foregoing affidavit.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to before me, the clerk of the district court of Dubuque county, Iowa, this 1st day of February, 1866.

Witness my hand and official seal

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: The Des Moines Navigation & Railroad Company, plaintiff in error, *vs.* Calvin Burr. Affidavit of James M. McKinley. Filed February, 1866. George B. Corkhill, clerk.

Motion on Behalf of the Iowa Homestead Company and Their Grantees to Intervene for the Purpose of Argument.

In the Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR, Defendant in Error. } No. 133.

Land.

Now, to wit, December 14, 1866, comes the Iowa Homestead Company and their grantees of the State of Iowa, and by their attorney, John F. Duncombe, moves the court to permit said parties to intervene in this cause for the purpose of argument on the part of defendant in error, and for the cause state—

1. That said company and their grantees are directly interested in the decision of this cause, in this, to wit: Said company and their grantees claim to be owners in fee simple of the land named
51 in the pleadings and over fifty thousand acres of other lands, the title to which is involved in the decision of the legal questions involved in this suit.

(Signed) J. F. DUNCOMBE,
Attorney for Intervener.

True copy.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Supreme Court U. S. December term, 1866. Des Moines Navigation & Railroad Company, plaintiff in error, *vs.* Calvin Burr. Motion on part of Iowa Homestead Company to intervene for argument. Filed 14th day of December, 1866. Granted. J. F. Duncombe, for interveners.

52 *C.—Docket Entries and Extracts from Minutes Supreme Court United States in Sam'l G. Wolcott, Plaintiff in Error,* vs. *The Des Moines Navigation & Railroad Company.*

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

J. W. Gilbert, P. Smith (for intervenor), Chas. Tracy, Litchfield.

Docket entries:

1865, Nov. 27.—Record received and filed.
1865, Dec. 21.—Stipulation to submit filed.
1865, Dec. 21.—Brief of J. W. Gilbert for the plaintiff in error filed.
1865, Dec. 21.—Brief of Litchfield for the defendant in error filed.
1866, Jan. 2.—Submitted under 20th rule.
1866, Feb. 8.—Motion of Mr. Allison for leave to intervene, and also for leave to file printed argument.
1866, Feb. 8.—Affidavit of J. M. McKinley filed.
53 1866, Feb. 13.—Leave granted intervener to file argument before 1st of March.
1866, Feb. 21.—Brief of P. Smith for intervener filed.
1866, Feb. 26.—On motion of Mr. Cook, leave granted him to file argument before 1st March.
1866, Mar. 12.—Ordered to be continued to the next term, with leave to any of the parties to file additional arguments.
1866, Mar. 23.—Brief of Mr. B. C. Cook for intervener filed.

No. 204, of December Term, 1866.

Docket entries continued:

1866, Dec. 4.—Reply brief of Litchfield filed.
1866, Dec. 17.—Ordered that counsel have leave to argue this case with No. 133, if desired.
1867, May 13.—Adjudged to be affirmed with costs.

54 Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

The counsel for the plaintiff and the counsel for the defendant hereby agree to submit and do submit this case upon printed arguments.

Dated December 18, 1865.

(Signed) J. W. GILBERT,
Of Counsel for Plaintiff.

(Signed) EDWIN C. LITCHFIELD,
Of Counsel for Defendant.

True copy.
Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Stipulation to submit. Filed December 21, 1865.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque & Sioux City Railroad Company, a corporation, and by Wm. B. Allison, its attorney, now comes and moves the court for leave to intervene in the above-entitled cause as a party thereto, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made a part hereof.

(Signed) DUBUQUE & SIOUX CITY RAILROAD CO.,
By W. B. ALLISON, *Its Attorney.*

True copy.
Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

55 Endorsed as follows: Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation & Railroad Company. No. 303. Motion for leave to intervene on behalf of Dubuque & Sioux City Railroad Company. Filed 8th February, 1866. Wm. B. Allison.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION & RAILROAD COMPANY.

In error to the circuit court of the United States for the southern district of New York.

I, James M. McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney for the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had opportunity to examine the record in the above-named case; that, to my mind, the said record shows that the attorneys of said Wolcott either did not fully understand their case or the nature of the party opposed to them or had been instructed not to litigate the case in good faith; that the question involved in said case is one on which depends the title which the Dubuque & Sioux City Railroad Company acquired to about seventy-seven thousand acres of land to aid in the construction of said road; that a final decision of the above-named case against the plaintiff in error

would tend to greatly prejudice the said Dubuque & Sioux City Railroad Company, although they are not a party to the said case; that I have reason to fear the decision of the court below (near bottom of page 61 of the record) was obtained on substantially an *ex parte* presentation of the case and is greatly prejudicial to the interest of the Dubuque & Sioux City Railroad Company, and is contrary to what would have been the decision on a proper presentation and argument of the case; and, as aforesaid, that an affirmance of the judgment of the court below would prejudice the title
56 acquired by said Dubuque & Sioux City Railroad Company to said seventy-seven thousand acres of land and the title to their grantees.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to by James M. McKinley before me, clerk of the district court of Dubuque, Iowa, February 1, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation and Railroad Company. No. 303. Affidavit of James M. McKinley. Filed 8th February, 1866.

57 Supreme Court of the United States. December Term, 1865.

Extracts from Minutes.

* * * * * * *

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

This cause was submitted to the consideration of the Court on the record and printed arguments, by Mr. Gilbert, of counsel for the plaintiff in error, and by Mr. Litchfield, for the defendant in error, under the 20th rule.

2d January, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

On consideration of the motion made and affidavit filed in this cause on the 8th instant, it is now here ordered by the court that leave be, and the same is hereby, granted counsel of the Du-
58 buque & Sioux City Railroad Company to file and submit printed arguments in this cause at any time before the 1st day of March next.

13th February, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

On motion of Mr. B. C. Cook, leave granted him to file a printed argument in this cause by the first Monday of March next.
26th February, 1866.

December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 204.

Ordered by the Court that this cause be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

Supreme Court of the United States. December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 204.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Nelson.
13th of May, 1867.
Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extracts from minutes, and judgment.

Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

59 Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT
vs.
THE DES MOINES NAVIGATION & RAILROAD COMPANY. } No. 303.

The counsel for the plaintiff and the counsel for the defendant hereby agree to submit and do submit this case upon printed arguments.

Dated December 18, 1865.

(Signed) J. W. GILBERT,
Of Counsel for Plaintiff.

(Signed) EDWIN C. LITCHFIELD,
Of Counsel for Defendant.

True copy.
Test: [SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Stipulation to submit. Filed December 21, 1865.

60 Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION & RAILROAD COMPANY.

In error to the circuit court of the United States for the southern district of New York.

I, James M. McKinley, on oath say that I am an attorney and counsellor at law, and am assistant attorney for the Dubuque & Sioux City Railroad Company; that within the past few days and not before I have had opportunity to examine the record in the above-named case; that, to my mind, the said record shows that the attorneys of said Wolcott either did not fully understand their case or the nature of the party opposed to them, or had been instructed not to litigate the case in good faith; that the question involved in said case is one on which depends the title which the Dubuque & Sioux City Railroad Company acquired to about seventy-seven thousand acres of land to aid in the construction of said road; that a final decision of the above-named case against the plaintiff in error would tend to greatly prejudice the said Dubuque & Sioux City Railroad Company, although they are not a party to the said case; that I have reason to fear the decision of the court below (near bottom of page 61 of the record) was obtained on substantially an *ex parte* presentation of the case, and is greatly prejudicial to the interest of the Dubuque & Sioux City Railroad Company, and is contrary to what would have been the decision on a proper presentation and argument of the case; and, as aforesaid, that an affirmance of the judgment of the court below would prejudice the title acquired
61 by said Dubuque & Sioux City Railroad Company to said seventy-seven thousand acres of land and the title to their grantees.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to by James M. McKinley before me, clerk of the district court of Dubuque, Iowa, February 1, 1866.
Witness my hand and official seal.
[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy.
Test: [SEAL.] D. W. MIDDLETON,
Clerk Sprueme Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* Des Moines Navigation & Railroad Company. Affidavit of James M. McKinley. Filed 8th February, 1866.

John Browne's Deposition.

I have charge of the defendant's lands in Iowa, the taxes on which are in controversy, as her agent. I have been the defendant's agent since the summer of 1866.

As the defendant's agent my business has been to pay the taxes assessed on her lands, to sell the same and receive payments therefor, and give them my care in attending to their general interest.

As such agent I was required and it was my duty to attend to all matters of litigation in this State affecting the lands of defendant in any manner.

I had notice and accepted service of the original in the suit of the Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company and others, which was commenced in the district court of Webster county and was removed to the circuit court of the United States by counsel for the non-resident owners on my affidavit bond, and was finally determined, on appeal, in the
62 Supreme Court of the United States at the December term thereof, 1872, and reported in 17 Wallace, page 152.

During the pending of that suit and others involving the title to lands known as the Des Moines river lands I had charge, as agent, of the interests of nearly all of the non-resident owners, including those of the defendant, as well as those of the Des Moines Navigation & Railroad Company. I retained counsel and paid all the expenses and fees to counsel incurred by the litigation; in all of which the defendant's lands were protected by me, as her agent, the same as were the lands of all the other non-residents who had derived a title from the Des Moines Navigation & Railroad Company, and for whom I was agent.

To pay expenses and counsel fees I assessed the non-resident owners, including defendant and her husband, according to their interests in the lands involved in the controversy, and the defendant's portion of the assessment was included in charges made in my accounts with the defendant's husband, amounting in all to about $1,400. These charges were made with the knowledge and consent of defendant and her husband.

An agreement between the parties to this suit, as follows:

That the reports of the cases of the Dubuque & Pacific Railroad Company *vs.* Edwin C. Litchfield, in 23 Howard, 66; The Iowa Homestead Company *vs.* The Des Moines Valley Railroad Company, in 17 Wallace, 153, and Wolcott *vs.* The Des Moines Valley Railroad Company, 5 Wallace, 681, as reported therein, shall be received as evidence by the court as far as competent and material to any of the issues herein.

63 *Decree.*

EDWARD K. GOODNOW *vs.* EDWIN C. LITCHFIELD.

This cause coming for final hearing, the plaintiff appearing by his attorney, and the defendant appearing by his attorney, C. H.

Gatch, was duly submitted to the court upon the pleadings, evidence, and arguments of counsel, and the court desiring to take cause under advisement it was ordered, with consent of the parties to the suit, that the decision of the court be rendered in vacation, and that the decree of the court be entered as of the 4th day of March, 1884.

And the court, having duly considered the pleadings, evidence, and arguments of counsel, finds the issues in favor of the plaintiff, and further finds that said plaintiff is entitled to recover the sums of money paid by plaintiff's assignor and interest thereon from the times said payments were made.

The court also finds and decides that the plaintiff is entitled to a lien on the lands on which said taxes were paid.

It is therefore ordered, adjudged, and decreed that said Edward K. Goodnow, plaintiff, have and recover of and from Edwin C. Litchfield, the defendant, the sum of $4,606.18 and interest thereon at six per cent. per annum from the 4th day of March, 1884, and
64 costs of suit, taxed at —— dollars, and that said claim or decree be, and and is hereby, made a special lien on the lands described in plaintiff's petition, to wit, from the 28th day of April, 1873; that plaintiff have special execution, and that said lands be sold thereunder according to law.

Notices of appeal were served on the clerk of said court September 2, 1884, and on Geo. Crane, plaintiff's attorney, September 1, 1884.

Assignment of Errors.

1. The court erred in overruling the demurrer of defendant to plaintiff's petition.

2. The court erred in overruling the motion of defendant asking for a more specific statement in plaintiff's petition as to the character in which he sued.

3. The court erred in disallowing defendant's petition for removal to the United States circuit court and refusing to grant an order for such removal.

4. The court erred in sustaining plaintiff's motion for change of venue to the district court.

5. The court erred in holding and deciding on the final submission that plaintiff had such interest or relation to the cause of action sued on as entitled him to maintain suit in his name.

6. The court erred in holding and deciding on the final submission that the lands described in plaintiff's petition were subject to taxation for any of the years 1861, '2, '3.

7. The court erred in holding and deciding on the final submission that the plaintiff's claim was not barred by the statute of limitations of the State of the New York.

8. The court erred in holding and deciding on the final submission that plaintiff was not estopped from prosecuting this suit by the former adjudication in the said former suit of The Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company *et al.* and others.

65 9. The court erred in holding and deciding on the final submission that plaintiff was entitled to a lien on the several parcels of land in the petition described for the amounts of taxes paid thereon, respectively.

10. The court erred in holding and deciding on the final submission that plaintiff was entitled to interest on the several payments of taxes made by his assignor from the dates of payments thereof, respectively.

11. The court erred in holding that the payment of the taxes was not a voluntary payment.

12. The court erred in allowing interest without any proof of demand prior to bringing of suit.

13. The court erred in rendering any decree and not dismissing the bill.

C. H. GATCH,
Attorney for Appellant.

66 *Opinion of the Supreme Court of Iowa.*

GOODNOW *v.* LITCHFIELD. (Two cases.)

Appeal from Webster district court.

TUESDAY, *December* 15, 1885.

These cases involve claims for reimbursement for the taxes paid upon certain lands in Webster county. There were judgments for the plaintiff and the defendants appeal.

C. H. Gatch, for appellants; George Crane, for appellee.

ROTHROCK, *J.*:

I. The questions in these cases are substantially the same and require but one opinion for their determination. They are in many respects similar to cases already determined by this court involving the right to recover for taxes paid on what is known as the Des Moines river lands. The whole controversy is just this: The lands above what is known as the "Raccoon Fork of the Des Moines river" were for a long time in controversy between what is known as the "river grant" and the "railroad grant." The claimants under the river grant finally recovered the lands. Pending the various contests as to the title to the lands, the claimants under the railroad grant paid large sums of money in the discharge of taxes upon the lands. They claim that, inasmuch as the claimants under the river grant succeeded in obtaining the lands, they ought to pay the taxes thereon; or, what is the same thing, they ought to reimburse the claimants under the railroad grant for what they have paid. This court has been of that opinion, and in many cases which we have determined arising out of these matters we have determined

67 that the taxes were not officiously paid by the plaintiffs or their assignors, but that the payments were made in good faith and ought to be repaid, with six per cent. per annum interest from the time of the respective payments. The payments

in these cases are for taxes for the years 1861, 1862, and 1863. It is urged that the lands were not taxable for the year 1861. We had occasion to examine this question in the case of Goodnow *v.* Wells, *ante*, p. 654, decided at the present term, and we there held that the lands were taxable for that year, and with that decision we are content.

II. The defendant moved to require the plaintiff to make his petitions more specific, and the motions were overruled. The petitions show that the plaintiff sues as the assignee of the Dubuque & Sioux City Railroad Company. The assignment was in writing, and the same is exhibited with the petitions and made part thereof. It plainly appears from the petition that the plaintiff sued as trustee of an express trust, and he was specially authorized to bring and maintain suits in his own name to recover the taxes in question. We think the petitions were sufficiently specific.

III. The defendants filed petitions for the removal of the causes to the circuit court of the United States. They alleged that they were citizens of the State of New York, and "that the plaintiff, Goodnow, is only a nominal party to the suits, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Dubuque & Sioux City Railroad Company, which was at the commencement of the suits and still is a corporation under and by virtue of the laws of the State of Iowa and having its principal place of business in said State of
68 Iowa, which said railroad company directed the commencement of said suit, employed counsel to prosecute the same, and are directing and controlling the prosecution." The petition for removal was disallowed, and the defendants excepted and assign the ruling as error.

If the petition had been entertained by the court and the removal ordered it would have been upon the ground that the controversy was really between citizens of different States—that is, that it was an action between the Dubuque & Sioux City Railroad Company, of the State of Iowa, and of the defendant, a citizen of the State of New York; but the assignment to the plaintiff invested him with the title to the claim or cause of action, and authorized him to prosecute it by suit. We have recently decided that in such case a party has no right to a removal of the cause to the Federal court. See Vimont *v.* Chicago & N. W. R'y Co., 64 Iowa, 513.

IV. The venue of the actions was changed from the circuit court to the district court of Webster county on the application of the plaintiff. The defendants insist that the showing made for the change of venue was insufficient. The affidavit of the plaintiff in support of the motion to change the venue was as follows:

"STATE IOWA, *County of Webster:*

"In the Circuit Court of said County.

"EDWARD K. GOODNOW *v.* GRACE H. LITCHFIELD.

"I, Edward K. Goodnow, being first duly sworn, depose and say

that I am the plaintiff in the above-entitled action; that
69 M. D. Miracle, judge of this court is, to the best of my knowledge and belief, so prejudiced against me that I cannot obtain a fair trial before him, and that the existence of such prejudice was not known to me prior to the last continuance of this action.

"EDWARD K. GOODNOW.

"STATE OF NEW YORK, *County of New York:*

"I, A. C. Vaughan, a notary public in and for the county and State of New York, do hereby certify that the foregoing affidavit was sworn to before me and subscribed in my presence by said Edward K. Goodnow this eighth day of May, A. D. 1882.

"Witness my hand and seal.

[Seal Arthur C. Vaughan, Notary Public, Kings County, New York County.]

"A. C. VAUGHAN,

"*Notary Public, Kings County.*

"C't'f. filed in New York county."

It is objected that the affidavit was not authenticated, as required by the law, because the name of the State was not impressed on the seal of the notary public, and the case of Stevens *v.* Williams, 46 Iowa, 540, is relied upon as decisive of the question. In that case a notary public of Michigan affixed as a seal to a certificate to depositions a wafer, with his name and the name of the county written with a pen, and there was no impression on the paper or wafer. It was held that, as no proof was introduced that the laws of Michigan were different from our own, the authentication was not sufficient.

70 No objection is urged in argument as to the sufficiency of the seal, excepting that the name of the State is not engraved thereon. This is required by the laws of this State, and while it is true the laws of other States are presumed to be the same as our own, unless the contrary is shown, yet we think it is fair to presume that some showing was made in the court below that by the laws of New York the name of the State was not required to be engraved on the seal. Levy *v.* Wilson, 43 Iowa, 605. We think this should be presumed in this case, because it does not appear affirmatively that this specific question was raised in the court below. The only objection made to the change of venue was a general exception to the order making the same. It is said that no presumption can be entertained that any evidence was introduced, because it appears from the abstract that all of the evidence introduced in the court below is contained in the abstract. We think this has reference to the evidence taken upon the trial of the case in the district court and not to the preliminary proceedings in the circuit court. It is further objected that the supporting affidavit for a change was not properly authenticated, because in its caption it is entitled "State of Iowa, county of Webster," and it appears to have been sworn to before a notary public in Dubuque county, in this State. The presumption

is that the notary public took the affidavit in his own jurisdiction, and the caption does not show that it was sworn to in Webster county.

71 V. There is no other question in these cases except such as have been already determined by this court. We need not cite them. The most of them are cited in Goodnow *v* Wells, *ante*, p. 654, at the present term.

Affirmed.

72 *Judgment of the Supreme Court of Iowa. December* 15, 1885.

" EDWARD K. GOODNOW

vs.

E. C. LITCHFIELD, E. H. LITCHFIELD, Ex'r, App'l'ts.

Appeal from Webster dist. court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellants pay the costs of this appeal, taxed at $19.75, and that execution issue therefor."

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and complete copy of the final judgment entry of said court in the above-entitled cause, as full, true, and complete as the same remains on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 13th day of Sept., A. D. 1887.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY, *Clerk.*

Transcript fee, —.

73 *Supplemental Decree or Certificate.*

EDWARD K. GOODNOW, Appellee,

vs.

EDWARD H. LITCHFIELD, Ex'r of the Estate of Edwin C. Litchfield, Deceased, and Substituted for said Edwin C. Litchfield as Defendant and Appellant herein.

And now, on the application of said defendant, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of the defendant and in defendant's assignment of errors and on the hearing in said cause the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States in the case of the

Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company, and this defendant's testator, Edwin C. Litchfield, and others, at the October term thereof, A. D. 1872, and that our decision herein was and is against the immunity so claimed by the defendant herein.

And it is further certified and ordered to be made part of the record herein that by defendant's answer and on the hearing of said cause defendant claimed immunity from said entire claim and demand, because, as was claimed and alleged, the alleged cause of action not having accrued within six years preceding the commencement of this action was barred by the statute of limitations of the New York, and that, to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States in the case of Samuel G. Wolcott *vs.* The Des Moines Navigation & Rail-
74 road Company, reported in 5 Howard, 681, was a final determination of the question of title therein decided in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of said decision that said determination was not final.

And it is further certified and ordered to be made part of the record herein that $2,522.71 of the amount herein found and adjudged to be due from the defendant to plaintiff was so found and adjudged as and for that amount paid by plaintiff's assignor as and for taxes for the year 1861 on the lands in the petition described; that said lands are part of the so-called "Des Moines river lands," granted by the United States to the State of Iowa by act of Congress of August 8, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory," the joint resolution of Congress of March 2, 1861, entitled "A joint resolution to quiet title to lands in the State of Iowa," and the act of Congress of July 12, 1862, entitled "An act confirming a land claim in the State of Iowa, and for other purposes," and that all of said lands are located above the Raccoon Fork of the Des Moines river; that the validity of said taxes and the levy thereof for the year 1861 was drawn in question herein by the defendant on the ground, as maintained by defendant, that the lands were public lands of the United States, at least until March 2, 1861; and, if so, were not under the law of Iowa taxable until the year 1862; and this court decided herein that said lands were sub-
75 ject to taxation by the State of Iowa for the year 1861, and that said sum of $2,522.71 was recoverable of defendant by plaintiff because the same were so subject to taxation for that year.

And it is further certified and ordered to be made part of the record herein that the defendant on the hearing hereof claimed immunity from the demand and claim of plaintiff to the amount of said $2,522.71, on the ground that the same was paid by plaintiff's assignor as and for taxes levied on the lands in the petition described for the year 1861, during which year, as claimed by defendant, said

lands were under and by the legal effect of the joint resolution of Congress of March 2, 1861, entitled "A joint resolution to quiet title of lands in the State of Iowa," purchased by defendant's grantor of the State of Iowa, and were therefore for that year exempt from taxation under the statutes of said State of Iowa, and that our decision was and is that the defendant's said grantor did not under and by the legal effect of said joint resolution become a purchaser of said lands on said March 2, 1861, and therefore was and is against the immunity so claimed.

And it is further certified and ordered to be made part of the record herein that on the hearing of said cause the defendant claimed that this court had not jurisdiction to hear and determine the same, because, as was claimed, under and by virtue of the provisions of the act of Congress of March 3, 1875, for the removal of causes from State to Federal courts, by the petition, bond, and other proceedings of defendant for removal filed and had in the circuit court of Webster county, Iowa, from which the same came by appeal to this court,
the same was removed from said circuit court to the United
76 States court for the district of Iowa, central division. That
our decision herein was and is that said cause was not thereby removed, and, under the provisions of said act of Congress, was not thereby removable, and that this court had jurisdiction thereof to hear and determine the same on such appeal, and therefore was and is against the immunity so claimed.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

77 It is hereby agreed that the foregoing constitutes the entire record in the above-entitled cause, and that said cause is to be submitted thereon.

GEORGE CRANE,
Att'y for Def't in Error.
C. H. GATCH,
Att'y for Plaintiff in Error.

Endorsed on cover: Supreme Court U. S. 1887, October term. No. 670. Edward H. Litchfield, executor, &c., pl'ff in error, *vs.* George Crane, administrator, &c. Agreed record.

Stamped: Office Supreme Court U. S. Filed Oct. 5, 1887. James H. McKenney, clerk.